In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5474

WILLIE C. ENGRAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that due process requires that the government disclose to the defense before trial the arrest records of its prospective witnesses.

On September 24, 1973, petitioner and co-defendant Keith E. Gaffney[1] were arraigned in the Superior Court for the District of Columbia on a twenty-six count indictment charging them with rape, robbery, kidnapping, and burglary in the first degree (all while armed), grand larceny, and a variety of lesser included offenses. At a pretrial hearing on April 1, 1974, defense counsel requested that the government produce any criminal records of its witnesses at least seven days before trial. Government counsel replied that on the day of trial convictions which might be used for impeachment purposes would

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[1]Gaffney has not joined in this petition.

be produced, but not other records.[2] Defense counsel insisted, however, on the pretrial production of the entire arrest records of the government's witnesses, stating (Tr. April 1, 1974, pp. 13-14):

> I'm not only interested in impeachable convictions, I would like an opportunity to see what their records look like, and it might lead me to some further investigation on my own, depending on what turns up in their record. If I'm just given the record of impeachable convictions on the day of trial, I'm foreclosed from any investigations.

On April 23, 1974, the court ruled that such records were "*Brady*[3] material or possibly *Brady* material which might in turn lead to the discovery of evidence of an exculpatory nature" and ordered the government to produce, four days prior to the scheduled commencement of petitioner's trial, the records "of all prior convictions for all offenses and all prior arrests" of each prospective government witness (Pet. App. 3a-5a).

On May 2, 1974, the government advised the court that it would not comply with the order to disclose. The court then ruled, on May 22, 1974, that the government could not call any witness whose record had not been furnished to defense counsel pursuant to the court's previous order (Pet. App. 5a-8a). The government thereupon took a pretrial interlocutory appeal under D.C. Code § 23-104(a) (1973).

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[2]D.C. Code § 14-305 (1973) provides that, with certain exceptions, evidence that a witness has been convicted of a criminal offense shall be admissible for the purpose of attacking credibility if the offense was a felony or, if a misdemeanor, it involved dishonesty or a false statement.

[3]*Brady* v. *Maryland*, 373 U.S. 83.

On appeal, the District of Columbia Court of Appeals reversed, holding that the criminal records that the government had declined to produce were not *Brady* material (Pet. App. 16a-17a) and that, in suppressing the testimony of government witnesses as a sanction for failing to comply with its discovery order, the trial court had exceeded its authority (Pet. App. 19a).

1. Trial of this case has now been delayed approximately two years and is presently stayed pending disposition of the certiorari petition. Review by this Court of the court of appeals' interlocutory ruling would, unless the stay were vacated, further postpone trial. Such review is unnecessary and undesirable at this stage of the litigation. Petitioner may be acquitted at trial, in which case his claims as to the discoverability of the witnesses' criminal records will be moot. If, on the other hand, petitioner is convicted and his conviction affirmed, he will be able to present his contentions to this Court by way of a petition for certiorari seeking review of the final judgment.

The reversal by the court of appeals of the order directing the government to produce puts petitioner in the same position as if the trial court had ruled against him in the first instance. Such a ruling would not have been subject to interlocutory appeal. See *Cobbledick* v. *United States*, 309 U.S. 323. There is no reason to grant review of petitioner's claims now, since he will have full opportunity to present them to this Court again following the completion of his trial, should he still wish to do so.

2. In any event, *Brady* affords petitioner no entitlement to discover the criminal records of the government's prospective witnesses in advance of trial. That case holds that due process is violated when the government at trial suppresses material, exculpatory evidence requested

by the accused (373 U.S. at 87-88). It was not intended to provide the defense with a pretrial discovery tool with which to bypass the normally applicable rules governing and limiting discovery in criminal cases. Rule 16(a)(1)(B), Fed. R. Crim. P., contains the sole authorization for pretrial discovery of prior criminal records, and it is confined to the record of the defendant. Moreover, compliance with a discovery request such as is here involved would necessarily entail disclosure of the names of prosecution witnesses, yet Congress specifically rejected the proposed amendment to Rule 16 that would have permitted trial courts to order such disclosure.

Petitioner's position, if accepted, would completely abrogate the existing structure of criminal discovery rules by utilizing the *Brady* doctrine, which evolved in a quite different context, to authorize the pretrial discovery of witnesses' criminal records (and, ultimately, a great deal of other information not presently discoverable) whenever the defense requests them, without even the slightest particularized showing of need. If it is permissible to withhold the names and addresses of prospective prosecution witnesses, as is well recognized in our traditions of criminal procedure, despite the obvious utility that such information could have to the preparation of a defense in many cases, it follows *a fortiori* that the withholding of far less critical information such as the witnesses' criminal records cannot violate due process.

3. There is not, moreover, the least basis for concluding in this case that the criminal records of government witnesses would constitute exculpatory evidence subject to the disclosure requirements recognized in *Brady*. Indeed, it is hard to see how such material could be directly "material either to guilt or to punishment" (373 U.S. at 87); even if it were, there is no basis for concluding now that it will be suppressed at trial by the prosecution.

In this case petitioner suggested no reason whatever for believing that the evidence he sought was material to his defense in any way. Rather, petitioner's counsel requested discovery of the witnesses' criminal records on the wholly unsubstantiated speculation that "it might lead me to some further investigation on my own, depending on what turns up in their record" (Tr. April 1, 1974, p. 14). This purported justification amounts to little more than a demand that the government open its files to the defense so that the defense might see "what turns up." *Brady* stands for no such sweeping discovery rights of an accused. See *Moore* v. *Illinois*, 408 U.S. 786, 795 ("[w]e know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case"). Without stopping to consider the sort of showing necessary to satisfy the *Brady-Moore* standard of materiality, it is enough to say that those cases do not go so far as to hold due process violated whenever the government declines a discovery demand predicated on defense counsel's desire to see what certain government records "look like" as an initial source for "some further investigation * * * depending on what turns up * * *."[4]

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[4]We note also that the prosecution does not normally have the full criminal records of its prospective witnesses readily at hand. The prosecution may inquire about past convictions, which are relevant for impeachment purposes, but this information can usually be obtained directly from the witness. Obtaining a witness's full criminal record is ordinarily considered by prosecutors to be an intrusion upon privacy. In addition, the procurement of full criminal records is extremely time and resource consuming. For these reasons, the full criminal records are usually not in the prosecutor's possession; they are procured only when there exists some specific basis for believing that they may be relevant to the trial of a case.

4. Since petitioner can suggest no substantial reason to believe that the criminal records of the government's potential witnesses in this case would be material to the issues of guilt or punishment, his discovery demand may be seen as encompassing the claim that due process requires the disclosure of such records in every case. This apparently was the view of the Superior Court, which found that the government's refusal to disclose the records "could result in an injustice" (Pet. App. 2a). The court's rationale was as follows (*ibid.*):

> One need only reflect upon the possibility that a witness testifying as an eye-witness to the crime which is the subject matter of the indictment before the court may well have been in the custody of the police as the result of an arrest at the very time he claimed to be a witness or the witness may well have been languishing in a jail following a conviction of some minor offense, including a traffic charge, at the very time he claimed to have been a witness to the offense which is the subject of the indictment.

This rationale would compel disclosure of all government records concerning a prospective prosecution witness: birth records, marriage and divorce records, passport and visa records, immigration records, security clearance records, etc. It cannot fairly be argued that *Brady* requires automatic disclosure of such records, however, and criminal records are not by definition or category any more likely to be "material." The court of appeals therefore correctly rejected the proposition that *Brady* covers all matters that upon some hypothesized

set of facts (not even suggested by the defense) might prove material.[5]

5. *United States* v. *Agurs*, 510 F.2d 1249 (C.A. D.C.), certiorari granted November 17, 1975, No. 75-491, does not conflict with the decision in this case; nor do the issues therein presented require that the instant petition be held. *Agurs* involves a prosecution for murder and a claim of self-defense. The court of appeals held that due process was violated when the government did not disclose the criminal record of the victim—even though the defense never requested it. The court thus dispensed with the *Brady-Moore* requirement of a defense request, but it held fast to the materiality requirement.[6] The issue presented to this Court in *Agurs* concerns the relationship between the defense request requirement and the standard of materiality. Whatever role the defense request may be held to play in determining the demands of due process, it would seem beyond argument that some standard of materiality will have to be met before the government's duty to disclose attaches. Moreover, *Agurs* had nothing to do with the use of *Brady* principles to obtain pretrial discovery. In short, *Agurs* does not involve the claim, made in this case, that government records are discoverable under *Brady* whenever the

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[5]The reasons for disclosing that petitioner suggests (Pet. 14) are no more compelling than those of the trial judge. To take but one of petitioner's examples, it would seem that the defendant himself would know whether he had been a complaining witness in an earlier case involving arrest of the witness now prepared to testify against him, and that therefore access to the witness's criminal records would be unnecessary.

[6]See, *e.g.*, our petition in *Agurs*, at 10a. We are sending a copy of that petition to petitioner's counsel.

defense wishes to examine them to see what turns up."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

"As we note in our petition in *Agurs* (p. 10), a deliberate suppression by the government of obviously exculpatory evidence might violate due process even without a defense request for production. No such suppression is here alleged, however. Instead the claim is that government records must be turned over for whatever investigatory value they may have to the accused, a proposition which finds no support in the *Brady-Moore* rationale or in *Agurs*.